

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1323

To be argued by
DENISE COTE

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1323

UNITED STATES OF AMERICA,

Appellee,

—v.—

ROTHWELL REDDICK,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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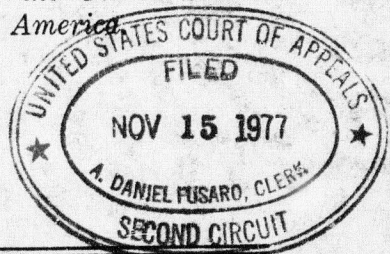
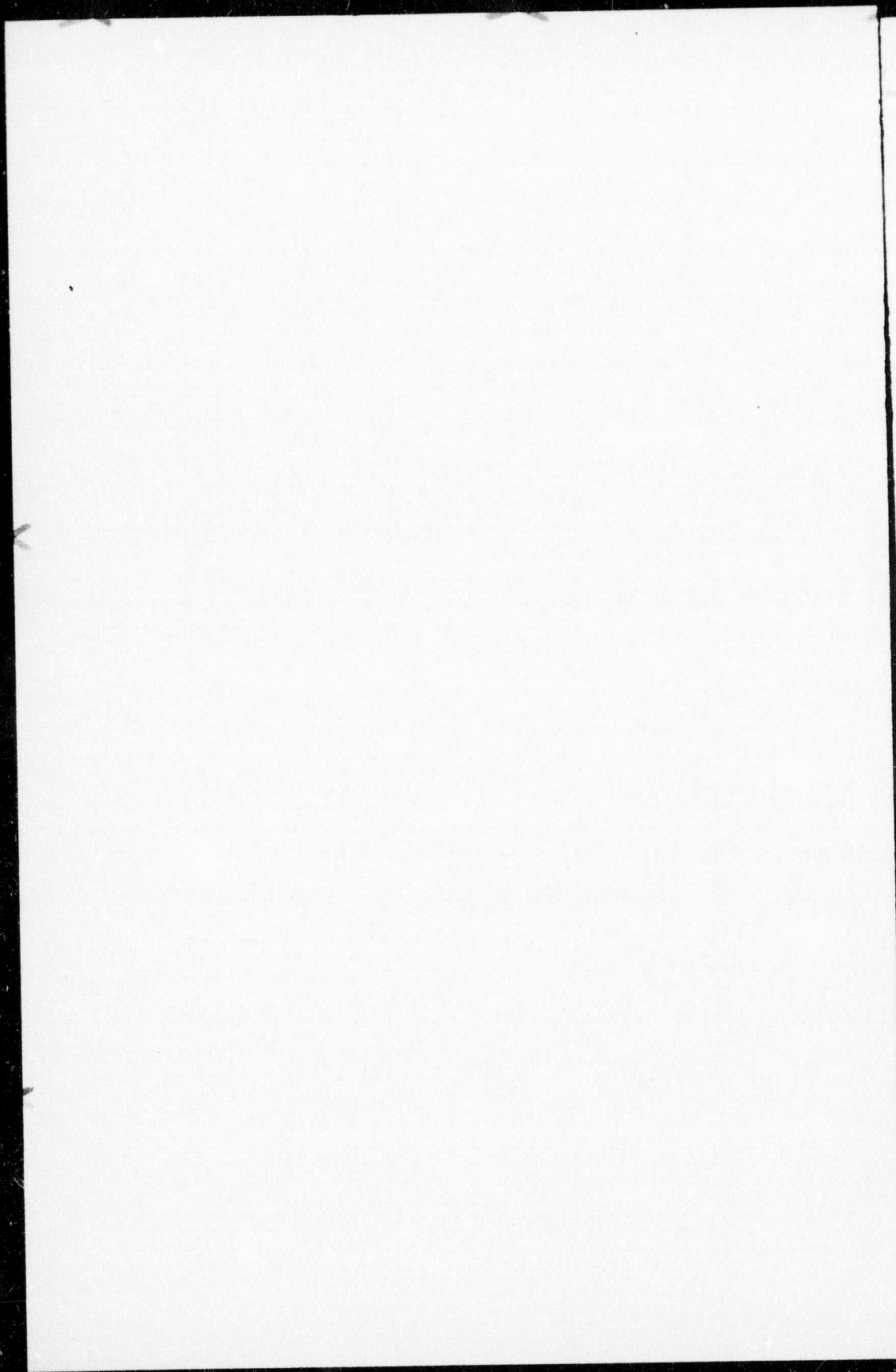


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Preliminary Statement

Rothwell Reddick appeals from a judgment of conviction entered on July 27, 1977, in the United States District Court for the Southern District of New York after a three day trial before the Honorable Marvin E. Frankel, United States District Judge, and a jury.

Indictment 77 Cr. 247, filed in one count on April 7, 1977, charged Reddick with possession of stolen mail in violation of Title 18, United States Code, Section 1708. The trial began on June 21, 1977. The jury returned a verdict of guilty on June 24, 1977.

On July 27, 1977, Judge Frankel sentenced Reddick to five years' imprisonment, sentence suspended except for five months. In addition, defendant was ordered to be placed on probation for two years following his release from prison.

Statement of Facts

A. The Government's Case

The Government's case established that Rothwell Reddick approached James Guischard, the payee of a New York State Unemployment Benefits check which had been stolen from the mails, and offered to give Guischard his check in return for a percentage of the check's value. To establish that Reddick possessed that check knowing that it was stolen from the mails, the Government proved that, around the same time, Reddick approached Walta Buttone, who was also a payee of a stolen unemployment check, with the same proposition.

On a Monday evening in February, Rothwell Reddick went to Walta Buttone's apartment with her unemployment benefits check for \$142.00. The check was addressed to "W.J. Buttone." (Tr. 26-27).^{*} Reddick told Ms. Buttone that he had a check for Willie Joe Buttone which someone had left at the numbers place where Reddick worked when they played \$35.00 worth of numbers. (Tr. 27, 30, 34). The person who had left the check had not returned to pay the \$35.00 as promised, and therefore, Reddick had brought the check in order to get the \$35.00 from Ms. Buttone. (Tr. 30). Reddick refused to come back later or to give Ms. Buttone any details about the numbers place where the check had been left. (Tr. 28, 30). He told Ms. Buttone she could not get her check back unless she paid him \$35.00. Indeed, he told her that if she did not cooperate he could fence the check and get half of its value. (Tr. 30-31, 42). Ms. Buttone paid \$35.00 for her check and reported the incident to a postman. (Tr. 31, 33).

^{*} "Tr." refers to the trial transcript; "App." to appendix for Reddick; and "Br." to brief for Reddick.

On the evening of February 7, 1977, which was also a Monday, Reddick went to James Guischard's apartment with an unemployment benefits check addressed to "J. A. Guischard." Mr. Guischard's apartment is located approximately one block from Ms. Buttone's home. Failing to find Guischard at home, Reddick talked to two of Mr. Guischard's neighbors, learned Mr. Guischard's first name was James, told them Mr. Guischard's check had been left as collateral for a \$20.00 numbers play, and attempted to sell the check to one of them. (Tr. 50-51, 83). When the neighbor refused to give him any money, Reddick left a slip of paper with the name Robert and his home phone number. (Tr. 51). The next morning Mr. Guischard learned of Reddick's visit the night before, called the phone number Reddick left without success and informed the police, the post office and the Postal Inspectors of the incident. (*Id.*). Later in the day Reddick showed up again with Guischard's check, repeated the same story about the check being left as collateral for a \$20.00 play on the numbers, and demanded \$20.00 before he would return the check. (Tr. 52-53, 85, 87-88). Mr. Guischard stalled Reddick, called the Postal Inspectors, and Reddick was arrested outside Mr. Guischard's apartment with Mr. Guischard's check in his hand. (Tr. 54, 97).

After his arrest Reddick told the Inspectors that he had loaned \$20.00 to someone named "James" and had received the Guischard check as security. When James failed to return to repay the loan, Reddick had approached the payee to get the \$20.00. He also insisted he was not committing a crime because he could have fenced the check if he had wanted. (Tr. 101). Reddick did not mention the Buttone check to the Inspectors, but, upon a search of his person, a car repair bill and a press card, each bearing the name Buttone, were discovered. In addition, the Inspectors seized a blank press card from Reddick. In response to questioning about these items

Reddick said he had had his car repaired recently and that he used the press cards to get into events. (Tr. 106-07, 109, 112). The Inspectors did not learn of Ms. Buttone's complaint until approximately one month after Reddick's arrest. (Tr. 33).

B. The Defendant's Case

Rothwell Reddick testified on his own behalf. On direct examination, he revealed felony convictions for possession of a loaded weapon and attempted forgery. On cross-examination, he admitted to a conviction for possession of five stolen money orders. (Tr. 778, 189, 226).^{*} Reddick admitted possessing the Guischard and Buttone checks and requesting reimbursement from each payee, however, he denied knowing the checks were stolen or holding the checks in ransom for payment.

Reddick told the jury that on February 7, 1977, two individuals he had known for years, James and Willie a/k/a "Shot," pressured him in the presence of two Spanish-speaking persons, "Rio" and "Angelo," to lend them \$35.00 with which to play the numbers. In return, they gave Reddick two checks which they had been unable to cash at a check-cashers and promised to repay him the \$35.00 plus a ten dollar bonus later that afternoon when they returned for their checks. In addition to his check, Willie left a car repair bill, two press cards and a dentist's bill with Reddick. (Tr. 142-50).

When James and Willie failed to return, Reddick went to Ms. Buttone, asked for Willie and was told he

^{*} Although Reddick told the jury on direct examination that he had pled guilty to possession of 192 pieces of stolen mail because he was guilty, on cross-examination after a luncheon recess, he denied pleading guilty to any such crime. (Tr. 178, 188).

was at a bar. Although Reddick gave Ms. Buttone the check at that point and told her he would return later to get the money from Willie, she insisted on giving him \$20.00 before he left. (Tr. 164-65). Reddick also described visiting Guischard's neighbors and under cross-examination admitted learning from them that Mr. Guischard's check might have been stolen. (Tr. 155ff., 205-06). Upon meeting with Mr. Guischard the following day, Reddick testified that he had not solicited money from Guischard, but to the contrary had assured Mr. Guischard that he would attempt to find James in order to make good his loss. (Tr. 170). Nevertheless, Mr. Guischard resisted Reddick's efforts to return his check and sent for the Postal Inspectors. (Tr. 171).

In addition to denying the tone and substance of the conversations as related by Ms. Buttone and Mr. Guischard, Reddick denied the statements made to Inspector Davis regarding the car repair bill and the identification cards. (Tr. 175). On cross-examination Reddick admitted having been a postal employee for the area in which the two payees lived, and that a master mailbox key for that route was lost during his tenure with the post-office. (Tr. 184-85, 189).

ARGUMENT

The Prosecutor's Summation Was Entirely Proper.

Reddick's only point on appeal is that the prosecutor's summation contained improper remarks which were so prejudicial as to require reversal of his conviction. This argument greatly exaggerates the record, which reflects that the comments now claimed to require reversal were so mild and appropriate that experienced trial counsel found no reason to object.

The defendant's specific objections to the summation are that the prosecutor used "inflammatory epithets" and that she asserted "her personal belief as to appellant's guilt . . ." (Br. 7). As to the latter claim, Reddick fails to cite even one instance where the prosecutor arguably expressed a personal belief. Certainly, the arguments that the defendant's testimony was a "terrific story, so unbelievable you could hardly come up with anything better" and that it was "simply too much to swallow" cannot be characterized as expressions of personal belief. The prosecutor did not preface these arguments with the personal pronoun or cast them as statements of her belief. Nor were these arguments, which were properly made by the prosecutor as an advocate for the Government, anything more than fair comment on the defendant's testimony. Where an argument attacking the truthfulness of a defendant's testimony is factually supported by the record ". . . there is no basis to claim reversible error simply because the language was blunt and to the point." *United States v. Gottlieb*, 493 F.2d 987, 994 (2d Cir. 1974). Moreover, the absence of any objection to these arguments acted as a waiver of any claim of error on appeal, *United States v. Head*, 546 F.2d 6, 8 (2d Cir. 1976), *cert. denied sub nom.*, *United States v. Wheaton*, 430 U.S. 931 (1977); *United States v. Ong*, 541 F.2d 331, 342-43 (2d Cir. 1976); *United States v. Canniff*, 521 F.2d 565, 571-72 (2d Cir. 1975), *cert. denied*, 423 U.S. 1059 (1976), and, at the same time, the absence of objection attested to the complete propriety of the arguments.

For his claim that the prosecutor used "inflammatory epithets," Reddick cites the prosecutor's use of the term "con man." (Br. 7). When appellate counsel argues that these comments were unduly prejudicial, he overlooks the trial situation in which these remarks were made. Defense counsel at trial did not attempt to characterize Reddick as an innocent. Rather, he himself drew a picture of Reddick as an opportunistic, street-wise individual, with a "sad, slightly sordid" background, who might strike the

jurors as someone they would not "want to invite home" (Tr. 245, 250, 253, 260). Indeed, trial counsel wove a defense which utilized the fact that Reddick was a sophisticated individual who knew how to "fence" stolen checks and would therefore be unlikely to risk approaching payees and leaving with Guischard's neighbors his true home phone number if he were dealing in stolen checks, as the Government contended he was. (Tr. 142, 143, 211, 249-51). When placed in this context, it is not surprising that trial counsel did not object even once to the Government's references to Reddick as a "con man." * It may well have served the defense's tactical purposes to leave that characterization as uncontested.

The cases cited in appellant's brief do not bear the slightest resemblance to this case. For example, in *United States v. DiStefano*, 555 F.2d 1094, 1104 (2d Cir. 1977), this Court addressed the issue of "plain error" in the context of a legally erroneous charge on false exculpatory statements. *United States v. Puco*, 436 F.2d 761, 762 (2d Cir. 1971), concerned the references by the prosecutor during the cross-examination of a defendant to post-arrest statements of the defendant to the prosecutor. While the Court did address the issue of the prosecutor's summation in *United States v. Gonzalez*, 488 F.2d 833, 836 (2d Cir. 1973), it reversed the conviction only after ruling that the prosecutor had misrepresented the record and that the defense counsel had made appropriate objections, neither of which occurred in the instant case. See also *United States v. Drummond*, 481 F.2d 62 (2d Cir. 1973) (range of prosecutorial misconduct so broad that trial judge had repeatedly warned the prosecutor); *United States v. Benter*, 457 F.2d 1174, 1176-78 (2d Cir.), cert. denied, 409 U.S. 842 (1972) (conviction affirmed

* Trial counsel was not ignorant of his right to object; he objected to other aspects of the Government's summation, none of which is raised on appeal. (Tr. 241, 263, 264).

despite the defendant's objection at trial to the prosecutor's "flinging of first-name epithets" at a defendant during the summation).

In sum, the Assistant United States Attorney delivered an appropriate summation consisting of logical arguments based on the evidence in the case. The comments alleged to constitute error were proper in the context of this case and simply do not amount to error, let alone plain error, as Reddick claims.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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STATE OF NEW YORK)
COUNTY OF NEW YORK)

DEAN M. SCHWARTZ, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 15th day of November, 1977 he served two copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

Martin Erdmann, Esq.
The Legal Aid Society
Federal Defender Services Unit
509 United States Courthouse
New York, N. Y. 10007

And deponent further says that he sealed the said envelope and placed the same in the mailbox drop for mailing outside the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Dean M. Schwartz

DEAN M. SCHWARTZ

Sworn to before me this
15th day of November, 1977.

Alma Hanson

ALMA HANSON
NOTARY PUBLIC, State of New York
No. 24-6763450 Qualified in Kings Co.
Commission Expires March 30, 1978

